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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

GEORGE D. KER and DIANE K. KER,
Defendants and Appellants.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion Below.

No Opinion was rendered by the trial court.

The Opinion of the District Court of Appeal, Second Appellate District, State of California, is reported at 195 A. C. A. 290 and 15 Cal. Rptr. 767.

A Petition for Rehearing was filed in said Court on September 13, 1961. Said petition was denied on September 20, 1961.

A Petition for Hearing was filed in the Supreme Court of the State of California on October 9, 1961. This petition was denied without Opinion on October 25, 1961. (56 A. C. Minutes p. 4.)

Jurisdiction.

Jurisdiction of this Court is invoked under Section 1257(3) of Title 28, United States Code.

Questions Presented.

Petitioner contends that three questions are presented for review in this matter. (Pet. for Writ of Cert. p. 3) It is the view of Respondent that two questions are presented in this case, as follows:

1. In the light of the facts of this case, was the contraband seized by the police officers taken in violation of the Fourth Amendment to the Constitution of the United States, thus making its introduction into evidence improper under the rule of *People v. Cahan*, 44 Cal. 2d 434, 282 P. 2d 905, 50 A. L. R. 2d 513?

2. If the answer to the foregoing question is "No.", was that evidence nevertheless inadmissible under *Mapp v. Ohio*, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081?

Statement of the Case.

In an information filed in the Superior Court of Los Angeles County, petitioners were charged with possession of marijuana in violation of Section 11530 of the Health and Safety Code, a felony.

To this charge petitioners plead "Not Guilty".

At the commencement of the trial appellant moved the trial court to set aside the information, under Section 995 of the Penal Code, upon the ground that they

have been committed without reasonable or probable cause. Evidence was taken on this issue out of the presence of the jury, and the motion was denied. Thereafter a trial was had before a jury, which returned its verdicts, finding each appellant guilty as charged in the information.

Thereafter appellant brought a timely appeal to the District Court of Appeal, Second Appellate District, State of California, and have since exhausted the state appellate procedures.

Statement of the Facts.

Respondent relies upon the Statement of Facts as set forth in the Opinion of the District Court of Appeal (Pet. for Writ of Cert. App. p. 1), with the addition of the following material:

After observing the meeting between Murphy and Ker, in the vicinity of the oil fields (Pet. for Writ of Cert. App. pp. 2-3), Sergeant Warthen followed the Ker automobile. Ker left the rendezvous, driving south to Slauson, then east on Slauson to LaBrea, then north on La Brea approximately one block. At this point Ker made a U-turn in the middle of the street, between intersections, thus heading back south on LaBrea. As the result of this maneuver Warthen lost the Ker vehicle. [Rep. Tr. p. 17.]

The Opinion of the District Court of Appeal states: "Having had reasonable cause to believe Ker was in his apartment and had in his possession a substantial amount

of marijuana, the officers believing he committed and was committing a felony, entered the premises for the purpose of arresting Ker." (Pet. for Writ of Cert., App. p. 11.) Petitioners question the accuracy of this statement by their reference to the Reporter's Transcript (on p. 8 of the Petition) wherein they state that, after entering the apartment ". . . the officers identified themselves and announced that 'we were conducting a narcotics investigation.'"

However, Mr. Ker testified at the time of trial:

> "Q. 'And proceed telling us what took place after the officers entered? A. Well, I didn't know what was going on and I stood up from my position sitting on the couch, and the officers came in, said, 'You are under arrest,' and handcuffed me. Two of them handcuffed me. One went into the bedroom, the other officer went into the kitchen, right past my wife where she was standing right at the doorway there, and then come out and said, 'Is this yours? We want you to come in here and see this'. So we went in there, well, they took us in there, and said, 'Is this yours?' I said, 'No.' They asked us if we had any knowledge that it was there, if it was ours, and we said, 'No,' it wasn't ours, and we didn't know how it got there. They had asked us these questions and we had just answered, 'No.'" [Rep. Tr. p. 96, line 26, to p. 97, line 14.]

ARGUMENT.

I.

The Officers Had Probable Cause to Believe Appellant George D. Ker Was in Possession of Marijuana at the Time of the Arrest, and the Entry and Search of the Premises Incident Thereto.

Respondent adopts by reference the citations of authority as set forth in the Opinion of the District Court of Appeal. In the interest of brevity, the argument of respondent will be supplemental to the facts and law as stated in said Opinion, avoiding repetition wherever possible.

In California, evidence obtained in violation of constitutional guarantees against unreasonable searches and seizures is inadmissible.

People v. Cahan, supra (44 Cal. 2d 434, 282 P. 2d 905, 50 A. L. R. 2d 513).

But the search of the person who is arrested and the search of his home, place of business, or effects, is proper as an incident to a valid arrest.

People v. Woods, 139 Cal. App. 2d 515, 521, 293 P. 2d 901;

People v. Hurst, 183 Cal. App. 2d 379;

Harris v. United States, 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399;

United States v. Rabinowitz, 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. 653.

An officer may make an arrest without a warrant:

"1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.

"2. When a person arrested has committed a felony, although not in his presence.

"3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed."

Pen. Code, Sec. 836.

The facts as stated in the Opinion of the District Court of Appeal make it readily apparent that the officers in this case had probable cause to believe that Appellant George D. Ker had committed a felony in their presence. Based on what they knew of Murphy's *modus operandi*, from the observations of the previous evening, the officers were certainly entitled to assume that the same transaction had taken place in the Murphy-Ker rendezvous as had occurred on the previous evening. The two transactions were identical in every detail.

In considering this aspect it should be remembered that the rule having to do with probable cause does not place the ordinary man of ordinary care and prudence in the same class with officers experienced in the detection of narcotic offenders. Conduct and circumstances which might not excite the suspicion of the man on the street might be highly significant to an officer who has had extensive training and experience in the devious and cunning attempts of narcotic offenders to conceal their crimes.

People v. Williams, 196 A. C. A. 828.

In addition to the observations at the rendezvous, the officers were entitled to draw certain conclusions from the sudden U-turn made by appellant on LaBrea Boule-

vard, a street which can be judicially recognized as normally very busy. Under the circumstances this U-turn was properly viewed by the officers as evasive—*i.e.*, conduct of a sort that is usually termed "furtive."

The officers were entitled to view this behavior as furtive conduct, lending further credence to their belief that Ker was a narcotics violator.

People v. Augustine, 152 Cal. App. 2d 204, 205, 313 P. 2d 37;

People v. Tahtinen, 50 Cal. 2d 127, 323 P. 2d 442;

People v. Taylor, 174 Cal. App. 2d 448, 451, 344 P. 2d 837;

People v. Poole, 174 Cal. App. 2d 57, 60-61, 344 P. 2d 30;

People v. McMurray, 171 Cal. App. 2d 178, 185, 340 P. 2d 335;

People v. Amado, 167 Cal. App. 345, 347, 334 P. 2d 254;

People v. Martin, 46 Cal. 2d 106, 108, 293 P. 2d 52.

Since the U-turn would lead one to believe that appellant was apprehensive of being followed, his evasive maneuver was also a red flag to the officers, warning them that he might well attempt to destroy the evidence in his possession. It is judicially recognized that narcotic suspects who are about to be apprehended frequently attempt to destroy or conceal the evidence in their possession, and that the flushing of narcotics

down the toilet is a familiar method of disposing of contraband evidence.

People v. Williams, 175 Cal. App. 2d 774, 776;

People v. Crowley, 193 A. C. A. 316, 320.

The officers were entitled to take immediate action to prevent the loss of the evidence.

People v. Merino, 151 Cal. App. 2d 594, 597, 312 P. 2d 48.

And they were entitled to assume that if they did not effect an immediate entry into appellant's home he would probably attempt to dispose of the evidence.

People v. Maddox, 46 Cal. 2d 301, 305, 294 P. 2d 6;

People v. Ramsey, 157 Cal. App. 2d 178, 184, 320 P. 2d 592;

People v. Shelton, 151 Cal. App. 2d 587, 588, 311 P. 2d 859.

Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with Penal Code Section 844 (having to do with the method of entry to effect an arrest; see Pet. for Writ of Cert. App. p. 10).

People v. Hammond, 54 Cal. 2d 846, 854, 357 P. 2d 289;

People v. Maddox, supra (46 Cal. 2d 301, 306, 294 P. 2d 6).

In view of the foregoing, we respectfully submit that the evidence in this case was not the subject of an unlawful search and seizure, within the rule of *People v. Cahan, supra* (44 Cal. 2d 434, 282 P. 2d 905, 50 A. L. R. 2d 513), and the line of cases following it. It therefore follows that, insofar as the law of the State of California is concerned, the evidence was properly admitted.

As we read *Mapp v. Ohio, supra* (367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081), the result must be the same under that case. *Mapp* merely requires California to do what it has already been doing for some years under *People v. Cahan, i.e.,* to exclude evidence that has been obtained in violation of the Fourth Amendment. If some distinction between State and Federal rules is to be made, we are not informed of it in the Petition herein.

Other than *Mapp v. Ohio* the only Federal case cited by petitioners is *Agnello v. United States,* 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145. But the distinction between *Agnello* and the case at bar is patent in that in *Agnello* the officers entered for the purpose of searching the premises, and the decision holds that the fact that the officers had proximate cause for the belief that an *article* was concealed in a dwelling house furnished no justification for a search thereof. (269 U. S. at p. 33.)

Respondent relies upon *United States v. Rabinowitz, supra* (339 U. S. 56, 65-66, 70 S. Ct. 430, 94 L. Ed.

653), holding that "reasonableness under all the circumstances" of the individual case is the correct criteria for determination of whether or not a search and seizure has violated a constitutional guarantee. The reasonableness of the search incident to the arrest of appellant George D. Ker is demonstrated by the facts of the case at bar.

Conclusion.

It is respectfully submitted that the record in this case demonstrates that no rights guaranteed to the appellants by the Constitution of the United States were violated. The judgment of the California District Court of Appeal should therefore stand. It is respectfully requested that the petition herein be denied.

STANLEY MOSK,
Attorney General,

WILLIAM E. JAMES,
Assistant Attorney General,

GEORGE W. KELL,
Deputy Attorney General,

Attorneys for Respondent People of the State of California.